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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. VINCENT WADE TAYLOR, Defendant and Appellant.	C036054 (Super. Ct. No. 98F01460)

APPEAL from a judgment of the Superior Court of Sacramento County. Kenneth L. Hake, Judge. Affirmed.

Jeffrey J. Stuetz, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Thomas Y. Shigemoto, Supervising Deputy Attorney General, and Craig S. Meyers, Deputy Attorney General, for Plaintiff and Appellant.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and II.

A jury convicted defendant of the following charges: count two, assault with a firearm on Darryl Lavan (Pen. Code, § 245, subd. (a)(2); further references to sections of an undesignated code are to the Penal Code); count three, attempted robbery of Shunn Oliver (§§ 664/211); count four, assault with a firearm on Oliver (§ 245, subd. (a)(2)); and count seven, being a convicted felon in possession of a firearm (§ 12021, subd. (a)).[1] The jury also found true special gun use allegations for count two (§ 12022.5, subd. (a)) and count three (§ 12022.53, subd. (b)). Defendant was sentenced to an 18-year state prison term.

On appeal, defendant argues, inter alia, there is no substantial evidence to support his convictions for counts three and four, both involving victim Oliver. Defendant also makes two constitutional challenges to section 12022.53, which provides for a mandatory 10-year term for using a weapon in specified crimes. We shall affirm the judgment.

FACTS

On February 11, 1998, at approximately 11:00 p.m., victims Lavan and Oliver were walking toward Big Ben's Burgers on Del Paso Boulevard. Defendant and another man were standing on the corner. As the victims approached, defendant shouted out to Lavan, asking if they knew each other from county jail. Lavan stopped to talk with defendant while Oliver kept walking. Lavan

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[1] Defendant was acquitted of count one, attempted robbery of Lavan, and counts five and six, which charged him, respectively, with attempted robbery and assault with a firearm of Anita Gasper.

did not recognize defendant. According to Lavan, defendant directed Lavan to hand over his watch. Angry at defendant's demand, Lavan approached defendant, expecting to fight. Instead, defendant pulled a gun from his waist and fired a single shot, striking Lavan in the thigh. Lavan fled in the direction of a nearby casino. When Lavan was across the street, defendant fired a second shot, again striking Lavan in the leg. Defendant then began pursuing Lavan.

Upon hearing gunfire, Oliver crouched between two parked cars. Defendant's pursuit of Lavan ceased when he spotted Oliver. Defendant pointed his gun at Oliver, who was wearing new boots and a new jacket, and told him to "'[t]ake your boots and your coat off.'" When Oliver unzipped his jacket, defendant noticed the necklaces Oliver was wearing and said, "'Take the shit off your neck too.'" Oliver was in the process of complying when a police vehicle drove past. Defendant turned and ran away.

Sacramento police officers were dispatched to the area in response to a call of shots fired. Officer Husted arrived and observed defendant discard a handgun while fleeing the area. Husted released his canine partner, who was able to apprehend defendant. Once in custody, defendant was identified by both Lavan and Oliver as their assailant. Officers located two spent rounds in the cylinder of the firearm discarded by defendant.

Defense

Defendant testified that earlier in the evening he sold some drugs and later, while standing on the corner, was

approached by Lavan and Oliver. Lavan inquired about defendant's presence in the area, indicating he had not seen defendant previously. Lavan started an argument and pulled out a firearm. In response, defendant reached for his gun, and after Lavan fired a shot that missed, defendant fired back. According to defendant, Lavan retreated and fired again. Defendant fired a second shot and Lavan ran across the street. Defendant denied pursuing Lavan, and also denied approaching Oliver and demanding property from him. When defendant realized the police were approaching, he fled but was quickly apprehended.

I

Defendant argues there is no substantial evidence to support his convictions of counts three and four, which concern, respectively, the attempted robbery and assault with a firearm on Oliver.

In evaluating a claim of lack of substantial evidence, a reviewing court is required to examine "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Oliver testified that after the altercation between defendant and Lavan, defendant turned his attention to Oliver, who had taken cover between two parked cars after hearing the

gunshots. Defendant pointed a gun at Oliver and demanded he remove his jacket and boots. While Oliver was in the process of complying, defendant demanded Oliver remove his necklaces as well. According to Oliver, defendant abandoned his assault only when he spotted an oncoming police vehicle and attempted to flee.

On appeal, defendant points to various "discrepancies" in Oliver's testimony and concludes therefrom that no reasonable jury could have found Oliver to be a credible witness. As but one example, defendant makes the claim Oliver's testimony is legally insufficient because Oliver never told police that defendant demanded Oliver's necklaces. The claim is specious.

Officer Sens testified that in interviewing Oliver after defendant was apprehended, Oliver stated defendant held a gun on him and ordered him to remove "I believe it was his jacket and his shoes." Sens later clarified Oliver had said boots and not shoes. There was no questioning of Sens as to whether Oliver also indicated he had been asked to remove his necklaces; it thus is mere speculation that Oliver did not mention his necklaces to the police.

In any event, Oliver testified defendant demanded Oliver remove his necklaces, and that testimony was entitled to be judged on its own, and not on the basis of speculation that Oliver may or may not have mentioned such fact to the interviewing officer. (*People v. Provencio* (1989) 210 Cal.App.3d 290, 306.)

Defendant points to other such "discrepancies" in Oliver's testimony and invites this court to conclude therefrom that Oliver's testimony was unreliable. We see no reason to indulge defendant in this fruitless effort. It is doubtful any victim of a crime, and especially one whose friend has just been shot and who then is forced to look down the barrel of a gun, is able to reconstruct with one hundred percent accuracy all of the facts surrounding the event. For this reason, juries are instructed that failure of recollection is common, innocent misrecollection is not uncommon, and the fact there are discrepancies in a witness's testimony does not necessarily mean the witness should be discredited. (CALJIC No. 2.21.1.)

Oliver's credibility and the weight to be given his testimony were matters committed to the trier of fact. (*People* v. *Flummerfelt* (1957) 153 Cal.App.2d 104, 105-106.) It is not the responsibility of this court to reweigh the evidence or resolve conflicts therein in favor of the defendant. (*Id*. at p. 106) Despite certain "discrepancies" in Oliver's testimony, the jury obviously deemed Oliver a credible witness as least insofar as it accepted his claims that defendant pointed a gun at him and demanded certain items of property. Nothing in the record or in the law permits us to tamper with that determination. (*Ibid*.; see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 ["'Although [appellate courts] must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the

credibility of a witness and the truth or falsity of the facts on which that determination depends. . . .'"].)

Because the jury acquitted defendant of count one, charging him with attempted robbery of Lavan (who claimed defendant demanded Lavan's watch before pulling out a gun and firing at him), defendant asserts the jury likewise was required to discount Oliver's testimony. We disagree. There was nothing improbable in the jury's rejecting Lavan's testimony, in part, but nonetheless concluding that defendant subsequently used undue force in firing his weapon at Lavan and then turned his criminal intentions toward Oliver.

Finally, there is no merit in defendant's argument the jury should have rejected Oliver's testimony because it rejected Gasper's testimony in acquitting defendant of counts five and six (see fn. 1, *ante*). The record provides a reasonable explanation for the jury's rejection of Gasper's testimony in its totality. Gasper, who was in the area where the assault on Lavan and Oliver took place, testified defendant's alleged assault and attempted robbery of her occurred *30 minutes to one hour* after the gunshots were fired. Gasper's testimony was irreconcilable with that given by Lavan and Oliver, as they testified that within minutes of defendant's assault on them, police officers arrived on the scene and apprehended defendant. Gasper's testimony was unbelievable in other respects. For example, Gasper initially testified that when the police arrived on the scene, they parked approximately *one-half inch* from where she was standing. She then changed her testimony to say that

officers parked approximately *one-half mile* away, then changed her testimony again to say the police parked approximately *15 feet* away.

Given that Gasper's testimony was so conflicting, it is not surprising it was rejected by the jury. Defendant's interaction with Oliver, however, was completely separate, and Oliver's testimony about that incident was entitled to be judged on its own merits. His testimony was more than sufficient to sustain the jury's findings on counts three and four.

II

Defendant argues the attempted robbery conviction (count three) must be reversed because there was no evidence of an intent permanently to deprive Oliver of his personal property. Specifically, defendant claims "[a] request to remove boots and a jacket is consistent with an intent [simply] to prevent Oliver from following [defendant]." Defendant's claim is specious.

It is absurd to suggest the jury could not infer defendant had an intent permanently to deprive Oliver of his jacket, boots, and necklaces. According to Oliver, defendant shot at and pursued Lavan before discovering Oliver hiding between the parked vehicles. Oliver testified, clearly and unequivocally, that defendant pointed a gun at him and ordered him to take off his boots and jacket. When Oliver unzipped his jacket, his necklaces were exposed, at which point defendant ordered Oliver to remove the necklaces as well. Defendant's demands lead to but one reasonable conclusion: defendant intended to deprive Oliver permanently of his property.

Although defendant endeavors to make his statements look innocent because they were not demands to steal per se, the entire scenario as elicited by the evidence suggests defendant could not have had any interest in Oliver's property unless he intended to take it. It is unlikely defendant wanted Oliver to remove his boots and coat to keep Oliver from pursuing defendant. Presumably, Oliver could have run faster sans both items. Defendant's further demand that Oliver remove his necklaces is icing on the attempted robbery cake. Defendant can make no claim his demand that Oliver remove his jewelry had anything to do with an effort simply to prevent Oliver from pursuing defendant. Any reasonable jury would have concluded defendant had the intent permanently to deprive Oliver of his property. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933; *People v. Johnson, supra,* 26 Cal.3d at p. 576-577.)

III

Defendant argues the application of section 12022.53, subdivision (b) to attempted robbery violates the equal protection clause of the state and federal Constitutions. Section 12022.53, subdivision (b), states in relevant part: "(b) Notwithstanding any other provision of law, any person who is convicted of a felony in subdivision (a) [which includes attempted robbery], and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony. . . ."

Defendant argues application of section 12022.53 in this case violates equal protection in that there is no rational basis for including attempted robbery within the confines of the section, and not including other crimes such as assault with a firearm. Defendant's claim lacks merit.

"In order to establish a meritorious claim under the equal protection provisions of our state and federal Constitutions [defendant] must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.] Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment." (*People v. Green* (2000) 79 Cal.App.4th 921, 924.)

In enacting section 12022.53, the Legislature indicated its intent as follows: "The Legislature finds and declares substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." (Stats. 1997, ch. 503, § 1.) There can be no question the statute is rationally related to the intent of the Legislature and supports a legitimate state interest. (*People v. Perez* (2001) 86 Cal.App.4th 675, 680.)

Nor can it be said the crimes of assault with a deadly weapon and attempted robbery with the use of a firearm involve the same risks. An assault is simply an unlawful attempt, coupled with present ability, to commit a violent injury on the

person of another. (§ 240.) Attempted robbery, on the other hand, almost always, albeit not necessarily, involves the application of violence. The Legislature may well have determined the reason why most defendants are convicted only of "attempt" to commit robbery is because the intended victims resisted, sometimes with serious consequences, the demands of the defendant to turn over property.

"Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious." (*McLaughlin* v. *Florida* (1964) 379 U.S. 184, 191 [13 L.Ed.2d 222, 228].)

It may well be that at some point in the future, the Legislature will take another look at whether all assaults involving the use of a weapon should be included within the confines of section 12022.53. As for now, however, the fact the Legislature chose not to include all gun-related assaults within the ambit of the section does not render the statute unconstitutional. (*Hale* v. *Morgan* (1978) 22 Cal.3d 388, 398.)

Defendant argues equal protection is violated because the prosecution elected to charge a section 12022.53 enhancement, depriving the trial court of the sentencing discretion it would have had defendant instead been charged with a different gun enhancement provision, i.e., section 12022.5, which carries a sentence enhancement of three, four or ten years. Defendant

argues that "[i]f discretionary punishment can be imposed, the case must be remanded for resentencing to allow the trial court to exercise its sentencing discretion . . . ." We disagree.

"'Prosecutors have great discretion in filing criminal charges. [Citation.] This discretion includes the choice of maximizing the available sentence (including charging of enhancements) to which a defendant might be exposed in the event of conviction [citations] and the timing of filing unrelated charges [citations]. Such discretion does not violate equal protection.'" (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 15.)

IV

Finally, defendant argues the mandatory nature of the punishment imposed pursuant to section 12022.53, subdivision (b) -- a 10-year consecutive term -- constitutes cruel and unusual punishment with regard to the crime of attempted robbery. We disagree.

First, and foremost, "[t]here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" (*Harmelin* v. *Michigan* (1991) 501 U.S. 957, 995 [115 L.Ed.2d 836, 865].) The question thus is whether the 18-year term imposed for defendant's current criminal escapades is cruel and unusual. It is not.

Generally speaking, the analysis for cruel or unusual punishment under California law is to consider the nature of the offense and of the offender. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) Unquestionably, the nature of the offenses involved

in this case were serious. Defendant, who had just shot Oliver's friend at near point blank range, approached Oliver, pointed a firearm at him, and demanded Oliver turn over his property. Oliver was in the process of complying when the passing of a police car interrupted the crime. To suggest these circumstances are not serious and fail to warrant a serious penalty is nonsense.

As to the nature of the offender criterion, the probation report shows defendant has an extensive criminal record, including several misdemeanor and three felony convictions, dating back to when defendant was 18 years old. Defendant has been to state prison twice and to county jail numerous times. Defendant's behavior in his current offenses was extremely violent and serious. Given both the nature of the crime and defendant's prior record, an 18-year term for the instant offenses could hardly be described as cruel or unusual.

DISPOSITION

The judgment is affirmed. (*CERTIFIED FOR PARTIAL PUBLICATION.*)

NICHOLSON, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.